Bail

The Appellant/Accused namely Panchapathi was directed to be released on bail as per order of this Honourable court in Crl.M.P.No.5166 of 03 in Crl.A.NO.868 of 03.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08-08-2007

CORAM

THE HONOURABLE MR. JUSTICE R.REGUPATHI

Criminal Appeal No. 868 of 2003

Panchapathi ... Appellant/Accused

vs

State rep. by its
Inspector of Police,
Kanchi Taluk Police Station,
Kancheepuram District. ... Respondent/Complant

Prayer:- Criminal Appeal filed against the judgment passed by the learned Additional District and Sessions Judge-cum-Fast Track Court No.II, Kancheepuram, Chingelpet District, in S.C.NO.119 of 2002 dated 13.05.2003.

For Appellant : Mr.R.Karthigeyan for
Mr.S.M.Loganathan.

For Respondent : Mr.Hasan Mohamed Jinnah
Government Advocate (Crl.Side)

J U D G M E N T

The appellant/accused was convicted for the offences punishable U/s. 366 and 376 IPC. and sentenced to undergo seven years rigorous imprisonment and also to pay a fine of Rs.1,000/-, in default, to undergo three months rigorous imprisonment for the offence under Section 366 IPC. and for the offence U/s. 376 IPC., he was sentenced to seven years rigorous imprisonment and to pay a fine of Rs.1000/-, in default, to undergo three months rigorous imprisonment, with a further direction to run the sentences concurrently by the learned Sessions Judge, Fast Track Court No.II, Kancheepuram, Chingelpet District, in S.C.NO.119 of 2002. Aggrieved against the said conviction and sentence, the present appeal has been filed by the appellant/accused before this court.

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2. The case of the prosecution is as follows:-

P.W.3 is the victim in the case and she was 16 years old at the time of occurrence, viz., 23.11.2000. P.W.1 is the grandfather and P.W.2 is the mother of P.W.3. P.W.3 was working as a maid servant at the residence of the appellant temporarily. Even earlier, the appellant was friendly with P.W.3. On 23.11.2000, the appellant proposed to go to Hydrabad, where he was working as a Lift Operator. On the request of the appellant, P.W.3 went to a nearby temple and there, they have planned to go to Hyderabad. They have proceeded to Kancheepuram and thereafter, reached Hyderabad by bus. The appellant and P.W.3 stayed at the residence of his friend. P.W.3 requested the friend of the appellant to perform her marriage with the appellant, for which, the appellant and his friend agreed. At that time, it is alleged that the appellant persuaded to have sex with her and it was declined by P.W.3. The appellant alleged to have promised her that it is he who is going to marry her and therefore, they can have such sex. Thereafter, the appellant compelled her, removed her dress and committed the offence in spite of P.W.3 raising voice. The appellant continued the said offence for the next one week. Thereafter, the appellant received a telephonic call from the native place stating that the relatives of P.W.3 are coming to Hyderabad. On their arrival, P.W.3 was taken back and entrusted with the parents. In the meantime, after knowing that P.W.3 is missing, P.W.1, grandfather of P.W.3, lodged a report with the police on 01.12.2000 stating that her granddaughter is missing.

3. (a) The trial Court examined 15 witnesses and marked 24 exhibits to substantiate the case of the prosecution. On the side of the defence, neither oral nor documentary materials were produced.

(b) The victim has been examined as P.W.3 before the trial Court. She has stated that she has completed 16 years. She was working for six months at the residence of the appellant. For the past two years, both the appellant and P.W.3 were in love with each other. This was known to the family members of the appellant. However, they have opposed for such a relationship and the marriage of the appellant with P.W.3. Under such circumstances, the marriage between the appellant with P.W.3 could not be performed. On 23.11.2000, on the request of the appellant, P.W.3 met him near the temple and on invitation of the appellant, initially went to Kancheepuram and thereafter, to Hyderabad on the next day. They have stayed at the residence of the friend of the appellant. It is further alleged that P.W.3 requested the appellant as well as his friend to perform their marriage for which they have agreed. The appellant requested P.W.3 to have sex with him for which P.W.3 refused. The appellant alleged to have persuaded P.W.3 by stating that it is he, who is going to marry her and compelled to have sex. After removing her clothes, it is alleged that the appellant committed sex with her. This, they have continued for one week. It was informed by the appellant that the presence of P.W.3 at Hyderabad was known to her parents and they are coming to Hyderabad to take her back. Accordingly, the relatives of P.W.3 took her back. By the time, a complaint has been given by P.W.1 with the police. On reaching Kancheepuram, P.W.3 was subjected to medical examination. M.Os.1 to 3, the dress purchased for P.W.3 by the appellant, were sent for chemical analysis.

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(c) P.W.1, the grandfather of P.W.3, after coming to know about the absence of P.W.3 at home, searched for her and ultimately, they came to know through the friend of the appellant that it is the appellant, who kidnapped P.W.3. Therefore, Ex.P-1, complaint, has been given to P.W.14, the Sub Inspector of Police, Kancheepuram Taluk Police Station. P.W.1 made arrangements through his relatives to bring P.W.3 back and accordingly, the she was brought back from Hyderabad. P.W.1 also stated that the age of P.W.3 is 16.

(d) P.W.2 is the mother of P.W.3. She has corroborated the evidence of P.W.1.

(e) P.W.4 is one of the Villager, who has seen the appellant in the company of P.W.3 at the bus stand and informed the same to the family members of P.W.3. Thereafter, P.W.4 also accompanied P.W.1 for giving complaint to the police.

(f) P.W.5 is also a neighbour in the village, who alleged to have seen the appellant in the company of P.W.3 at Kancheepuram bus stand.

(g) P.W.6 is a witness, who belongs to the same village, and he corroborated the evidence of P.Ws.1, 4 and 5.

(h) P.W.7 is related to P.W.3. While corroborating the evidence of P.Ws.1 to 4, she has stated that when returning back from Hyderabad, P.W.3 stayed at her residence for two days.

(i) P.W.8 is the Headmaster of the School, where P.W.3 was studying and through him, Ex.P-2, age certificate, has been marked, in which, it is stated that the date of birth of P.W.3 as 17.05.1986. She has studied up to 5th standard in that school.

(j) P.W.9 is the Court Clerk, who, on the requisition of the police, Ex.P-3, sent the clothes of P.W.3, M.Os.1 to 3, for chemical analysis. Ex.P-6 is the report of the Chemical Analyst. Ex.P-9 is the Serologist's report.

(k) P.W.10 is the medical officer, who examined P.W.3 on 05.12.2000. On production, P.W.10 examined P.W.3 and found her sufficiently grown up and did not notice any external injuries. She has given opinion to the effect that the hymen is ruptured and no injuries were noticed in her private parts and opined that she is accustomed to intercourse. Ex.P-10 is the opinion given by her. Ex.P-11 is the age certificate, wherein it is stated that P.W.3 is above 16 and below 17, after radiological examination.

(l) P.W.11 is the mahazar witness, who has attested the observation mahazar and the signature has been marked as Ex.P-12.

(m) The appellant, after arrest, was sent for medical examination through Ex.P-5. P.W.12 is the medical officer, who examined the

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appellant on 05.12.2000 and issued the potentiality certificate, Ex.P-13. Moreover, he has opined that the age of the appellant as 25 years. Ex.P-14 is the certificate to this effect. The semen of the appellant was sent for examination and Exs.P-7 and P-8 are the reports issued by the Forensic Science Laboratory.

(n) P.W.13 is the witness for arrest of the appellant. On arrest, the appellant has given a statement and the same has been reduced into writing. Ex.P-15 is the signature of P.W.13.

(o) P.W.14 is the Sub Inspector of Police, Kancheepuram Taluk Police Station, who received the complaint, Ex.P-1, from P.W.1 on 01.12.2000 and registered a case in Crime No.1082 of 2000 for an offence punishable under Section 366 IPC. Ex.P-16 is the First Information Report. During the course of investigation, he has altered the offence into Sections 366, 366-A and 376 IPC. and sent a copy of the First Information Report and other reports to the Inspector of Police. On 02.12.2000, he has received M.Os.1 to 3 under Form-95 and sent the same for examination.

(p) P.W.15 is the Inspector of Police, who conducted the investigation. During the course of investigation, he arrested the appellant on 04.12.2000 and his statement was recorded. He has received the age certificate of the victim from the Headmaster. He visited Hyderabad and prepared an observation mahazar, Ex.P-22. After examination of the witnesses and receiving the other documentary materials and on conclusion of the investigation, he filed the final report on 14.04.2001.

4. On conclusion of the trial, the accused was questioned under Section 313 of the Cr.P.C. on the incriminating materials made available during the course of the trial. The appellant denied the complicity of the commission of the offence and pleaded innocence.

5. The learned trial Judge, relying on both the oral and documentary materials produced by the prosecution, convicted and sentenced the accused as aforementioned.

6. The learned counsel for the appellant submits at the outset that on perusal of the ocular testimony of P.Ws.1 to 3, it is consistent that the age of P.W.3 is 16. But the prosecution has made all attempts to substantiate that P.W.3 is below 16 years. To substantiate such fact, P.W.8, the Head Master of the School, where P.W.3 was studying, was examined and age certificate has been marked, wherein it has been stated that her date of birth is 17.05.1986, so as to say that her age is 14 ½ years. It is further submitted that such evidence and age certificate furnished by the Headmaster should not be taken as a substantiate piece of evidence. P.W.8, in his evidence, has stated that for such entry of the date of birth, the birth certificate was not produced at that time. It is further stated that it is the customary practice that an approximate date at the time of admission will be given and such date will be entered in the Registry. A birth certificate is not available in this regard. This has been corroborated by P.W.2, the mother of P.W.3, who confirmed that a birth certificate was not given to the

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school at the time when P.W.3 was admitted in the school. The date, which is mentioned in the birth certificate is only an approximate date. Relying on the evidence of P.Ws.2 and 8, it is submitted that therefore, Ex.P-2, the age certificate of the victim, is not a substantive proof of evidence and the same cannot be acted upon. On the contrary, the evidence of P.Ws.1 to 3 are consistent and such oral testimony alone could be taken into consideration. To support such contention, the learned counsel for the appellant relied on the evidence of P.W.10, medical officer, who examined the victim girl and on radiological examination, P.W.10 has given certificate to the effect that P.W.3 is aged between 16 and 17 years. In view of the ocular testimony of P.Ws.1 to 3, which is in corroboration and conformity with the medical evidence, the evidence of P.W.10 alone must be taken into consideration in comparison with the age certificate issued by the School. It is further contended that the victim, who is a major and who was in love with the appellant two years prior to the date of occurrence, willingly eloped with the appellant to Hyderabad and under such circumstances, the offence under Sections 366 and 366-A IPC. cannot be substantiated. After reaching Hyderabad, while staying along with the appellant, though it is alleged that the appellant compelled her for sex, the fact remains that such activities continued for the next one week. Neither at Hyderabad nor after reaching the native place, P.W.3 complained about such compulsion or harassment to the respondent police. Under such circumstances, it must be presumed that P.W.3 is a willing partner for sex and the appellant cannot be alleged to have committed the offence punishable under Section 376 IPC. The other witness, viz., P.Ws.4 to 7, 11 and 13 are formal witnesses and those witnesses are not useful for the prosecution any more. Therefore, on the basis of the materials available, both oral and documentary, both the offences under Sections 366 and 376 IPC. are not made out and the learned counsel for the appellant submitted that the appellant is entitled for acquittal.

7. Per contra, the learned Government Advocate (Crl.Side) submits that the certificate issued by the School must be given preference than the ocular testimony of the evidence of prosecution witnesses and the medical evidence. Though P.W.3 voluntarily accompanied with the appellant to Hyderabad, it is the appellant, who compelled P.W.3 under the guise of performing marriage and was having sex with P.W.3. This act of promise and compulsion will amount to an offence punishable under Section 376 IPC. While relying on the school certificate, P.W.3 must be construed as a minor, who is aged about 14 ½ years. Under such circumstances, even though there is a consent given by the victim girl, the same cannot be construed as a consent in the eye of law and therefore, as per the definition under Section 376 IPC. the offence is proved beyond reasonable doubt and thereby the appellant is liable to be convicted. It is further submitted that when the offence of rape, under such circumstances, is substantiated and if it is accepted that P.W.3 is a minor girl, kidnapping such minor girl to Hyderabad will also substantiate the offence under Section 366 IPC., as she happened to be a minor. Consent given by a minor cannot be treated as a consent in the eye of law even to substantiate the offence under Section 366 IPC.

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8. I have perused the materials available on record and heard the submissions made. Before even assessing the materials available to substantiate the offence alleged, it is absolutely necessary to ascertain the age of P.W.3. It is the admitted evidence of P.Ws.1 to 3 that she is aged about 16 years at the time of occurrence, viz., 23.11.2000. This evidence of P.Ws.1 to 3 has been corroborated by P.W.10, the medical officer, who after radiological examination, stated emphatically that the age of P.W.3 is between 16 and 17. Such positive evidence of P.Ws.1 to 3 and medical evidence cannot be brushed aside easily. To substitute such evidence that P.W.3 is below 16, some more stronger piece of material must be made available by the prosecution. Ex.P-2 is the certificate issued by the School wherein it has been stated that the date of birth of P.W.3 is 17.05.1986. If this date of birth is supported by the birth certificate, certainly the certificate issued by the School Authorities can be taken as a conclusive proof. On the contrary, it is the evidence of P.W.8 that it is not supported by any materials including birth certificate. However, positively stated that not only for P.W.3, it is the practice for the school that such date of births are entered approximately. This evidence of P.W.8 has been confirmed by the mother of P.W.3, viz., P.W.2, who, in her evidence, has stated that such date of birth has been given by approximate. Therefore, I am of the considered view that the ocular testimony of P.Ws.1 to 3 corroborated by the medical officer could occupy a preferential position than a school certificate issued on imaginary basis. When the age of the victim has been concluded as 16, then as per Section 376 IPC., the consent of the girl may be taken into consideration to substantiate an offence of rape.

9. As per the evidence of P.W.3, she was in love with the appellant and known each other for two years prior to the date of occurrence. Moreover, both of them during this period have decided to marry. However, it is only the family members of the appellant opposed for such suggestion. It is only on account of that resistance of the family members, it appears that P.W.3 decided to go along with the appellant. On perusal of her evidence, her voluntary act of joining with him to go to Hyderabad could be visible. After reaching Hyderabad, a discussion about the marriage has been done with the appellant and his friend. They have promised that such a marriage will be performed. Under such circumstances, though it has been alleged that on compulsion, the appellant had sex with her, her subsequent conduct in co-operating with him for the next one week would go to show that even at the first incident, P.W.3 was a willing partner for such act. Under such circumstances, when there is consent on the part of P.W.3, who is a major, it is impossible to come to the conclusion that the act of the appellant can be categorised as an offence of rape. When there are materials to substantiate that P.W.3 willingly travelled along with the appellant to Hyderabad, the act committed by the appellant, under such circumstances, cannot be categorised as kidnapping. Therefore, I am of the considered view that both the offences are not made out.

10. In a case reported in 2005 Supreme Court Cases (Cri) 253 (Deelip Singh -VS- State of Bihar), it has been read as follows:-

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"With this verdict, the appellant no doubt extricates himself from the clutches of the penal law by getting the benefit of doubt on charge levelled against him. But, we cannot ignore the reprehensible conduct of the appellant, who by promising to marry the victim woman, persuaded her to have sexual relations and caused pregnancy. The act of the accused left behind her a trail of misery, ignominy and trauma. The only solace is that she married subsequently. We are informed that the female child born out of the illicit relationship is now living with her married mother and she is about 14 years of old now. Though there is no evidence to establish beyond reasonable doubt that the appellant made a false or fraudulent promise to marry, there can be no denial of the fact that the appellant did commit breach of the promise to marry, for which the accused is prima facie accountable for damages under civil law."

11. On perusal of the facts of the present case, though the case of the appellant is that he had never made any promise to marry, it is the evidence of the prosecutrix that she accompanied the appellant only believing the promise made by the appellant to marry her. Such promise has been betrayed by the appellant, for which, he is prima facie accountable for damages under Civil Law. When this aspect was under discussion, the learned counsel for the appellant submits that the victim girl got married during 2003 and settled with two children. The appellant also got married. In the above circumstances, the counsel for the appellant, on instructions, made an offer of Rs.50,000/-. Since the victim is already settled in life, P.W.2, the mother of the victim, was summoned before this Court today and she has willingly received the said amount of Rs.50,000/- on behalf of the victim. The receipt of payment of Rs.50,000/- by the mother of the victim is recorded.

12. In the result, the conviction and sentence passed by the trial Court as against the appellant is set aside and the appeal is allowed. It is reported that the petitioner is on bail. The bail bonds, if any, executed by the appellant shall stand cancelled.

bs/ji

sd/-
Asst.Registrar

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Sub Asst.Registrar

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TO

1. The Additional District and Sessions Judge-cum-
   Fast Track Court No.II,
   Kancheepuram,Chingelpet District.

2. The Principal Sessions Judge,
   Kancheepuram.

3. The Chief Metropolitan Magistrate
   Egmore, Chennai.

4. The Judicial Magistrate No.II,
   Kancheepuram.

5. The Chief Judicial Magistarte,
   Chingelpet.

6. The Superintendent, Central Prison,
   Cuddalore.

7. Inspector of Police, Kanchi Taluk Police Station,
   Kancheepuram District.

8. The Public Prosecutor, High Court, Madras.

9. The Director General of Police,
   Chennai.

10. The District Collector,
    Kancheepuram.

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rd 5.9.07

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